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IN THE

Supreme Court of the United States

October Term, 1959

No. 822

In the Matter of the Application of

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, and JOHN J. CASSESE, on behalf of himself and others similarly situated,

Petitioners,

for an order, pursuant to Article 78 of the Civil Practice Act,

against

ROBERT F. WAGNER, individually and as Mayor of the City of New York, STEPHEN P. KENNEDY, individually and as Police Commissioner of the City of New York, and HAROLD A. FELIX, individually and as Commissioner of Labor of the City of New York,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents for their statement in opposition to petitioners' application for a writ of certiorari respectfully show the following:

Question Presented

In a writing termed an executive order, the Mayor of the City of New York modified an existing program for the conduct of labor relations between the City and its employees. Simultaneously he stated that the order would not be made applicable to the uniformed police pending further study (R. 67). The question here is whether, despite the Mayor's expressed intent, the petitioners, who are a policeman and a police organization, may validly insist that the application of those provisions of the executive order relating to machinery for the presentation of grievances must be extended to include the uniformed police of New York City on the ground that failure to include them would violate their rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Statement

On March 31, 1958, the Mayor of New York City issued an "Executive Order on the Conduct of Labor Relations Between the City of New York and Its Employees", also described as Executive Order No. 49 (R. 15-21). There had been an Interim Order upon the same subject which was issued on July 21, 1954 (R. 55-64). Section 7 of the Executive Order (R. 20) incorporated by reference Section 5 of the Interim Order, dealing with the establishment of procedures for the consideration of grievances of City employees (R. 58-62).

The petitioners instituted this proceeding in the Supreme Court of the State of New York to compel the establishment of grievance procedures applicable to the Police

Department of New York City and for related relief (petition, R. 9-14; reply, 70-72; affidavits, 73-112). The respondents contended in substance that the Executive Order was not applicable to the uniformed police (answer, R. 38-45; affidavits, 46-54, 105-6).

In spite of the incidental reiteration in petitioners' Statement of some of the contentions previously made by them concerning the construction of the Executive Order which they advocated, they concede that Executive Order No. 49 has been held by the New York courts not to apply to the uniformed policemen of New York City (Pet. Brief, p. 8). Accordingly, there is no reason for detailed examination here of the bases for that conclusion, which, in substance, was drawn from the language of the order and other internal evidence of intent [*e.g.*, R. 58 (fol. 173), 124 (fol. 370), 126 (fol. 377); 56 (fols. 167-8), 125-6 (fols. 375-6)], and from a consistent pattern of prior and contemporaneous administrative construction (*e.g.*, R. 47-54, 88, 105-6), including the Mayor's press release issued together with the Executive Order, which stated that for the time being the latter would not be made applicable to the uniformed police (R. 67, 124).

A Justice of the Supreme Court of the State of New York dismissed the petition without prejudice (R. 5-6). His opinion (R. 113-4) is reported in 17 Misc 2d 42. The Appellate Division modified by dismissing the petition on the merits and otherwise affirmed the order appealed from (R. 119-120). Its opinion (R. 121-7) is reported in 8 A D 2d 369. The Court of Appeals affirmed the Appellate Division's order without opinion (Pet. Appendix B, pp. 31-34). Its judgment is reported in 7 N Y 2d 813, remittitur amended 7 N Y 2d 967 (*ibid.*, pp. 35-36).

ARGUMENT

No substantial question is presented for review regarding the alleged denial of equal protection of the laws.

(1)

In urging that certiorari be granted, the petitioners state that the decision herein may set a precedent for denial of grievance machinery to policemen in all municipalities. However, a review of applicable decisions in other jurisdictions makes it clear that the instant case is not one of first impression.

In *King* v. *Priest*, 357 Mo. 68, 206 S. W. 2d 547 (1947), appeal dismissed 333 U. S. 852 (1948), it was claimed that a rule of the St. Louis police department forbidding union membership was unreasonable. Conceding that the right to bargain collectively was non-existent for public employees, it was urged (206 S. W. 2d, at p. 553), among other things, that at least the presentation of grievances by a union on behalf of policemen could not be injurious to good order and discipline, or detrimental to efficiency. The department's rule was nevertheless sustained by the State court. An appeal to this Court was dismissed for want of a substantial federal question.

Massachusetts, while allowing union membership to public employees and the presentatio by them of proposals relating to salaries or other "conditions of employment", expressly excepts police officers (but not firemen) from all such privileges. Mass. General Laws (Ter. Ed.), C. 149, § 178D. North Carolina makes it a misdemeanor for a public employee to be a member of any union which has among its purposes collective bargaining with respect to "griev-

ances", labor disputes, etc. G. S. §§ 95-97 *et seq.* (N. C. Sess. Laws, 1959, c. 742). We have made no effort to review exhaustively the decisions or statutes of other states bearing upon the present discussion, but it is apparent that the case at bar does not have the nation-wide importance which the petitioners claim for it.

(2)

The privileges open to New York City employees under the Executive Order are extended as a matter of grace or favor, not as a matter of right.

A showing that another has been fortunate enough to be recipient of a *favor* at the hands of municipal officials or under a local ordinance, which the complaining party has been denied, does not establish a denial of equal protection. *McCoy* v. *Providence Journal Co.*, 190 F. 2d 760 (1st Cir., 1951), cert. den. 342 U. S. 894 (1951).

(3)

Ordinances or rules and regulations excluding the police from union membership, with its usual concomitants of collective bargaining and the like, have been sustained by the courts against constitutional attack based on denial of equal protection, and other constitutional grounds. See, *e.g.*, *King* v. *Priest*, 357 Mo. 68, 206 S. W. 2d 547 (1947), app. dism. 333 U. S. 852 (1948); *Jackson* v. *McLeod*, 199 Miss. 676, 24 So. 2d 319 (1946), cert. den. 328 U. S. 863 (1946); *C. I. O.* v. *Dallas*, 198 S. W. 2d 143 (1946); *Perez* v. *Board of Police Comm.*, 78 Cal. App. 2d 638, 178 Pac. 2d 537 (1947); *Conne* v. *Geary*, 298 Ill. App. 199, 18 N. E. 2d 719 (1939). See also the cases cited in *Butler* v. *Monaghan*,

200 Misc. 327 (Sup. Ct., N. Y. Co., 1951), and annotation, 31 A. L. R. 2d 1142.

Various considerations differentiate the police from other City employees with respect to their relationship to their employer, the people of New York City. As to a potential conflict of interest in connection with labor disputes if policemen were represented by labor organizations, see *Butler* v. *Monaghan, supra.* The New York City Charter, § 439 (Williams Press, 1957), prohibits policemen from contributing to political funds or belonging to any club or association "intended to affect legislation for or on behalf of the department or any member thereof".

In *People ex rel. Masterson* v. *French*, 110 N. Y. 494 (1888), the Court said (pp. 499-500):

> "The government of a police force assimilates to that required in the control of a military body, and the interference of an extraneous power in its practical control and direction, must always be mischievous and destructive of the discipline and habits of obedience, which should govern its subordinate members. If its determinations upon all questions are subject to review, and appeals to some tribunal outside the force may be taken without restraint, it must necessarily lead to a want of respect towards their official superiors, and an impairment of the habits of obedience and discipline which are so essential to the efficiency and good conduct of a well regulated police force."

Matter of Going v. *Kennedy*, 5 AD 2d 173, 182 (1st Dept., 1958), aff'd 5 N Y 2d 900 (1959), recognized "that the police department is a quasi-military organization." See also *Coane* v. *Geary*, 298 Ill. App. 199, 18 N. E. (2d) 719 (1939).

The powers and duties of the police, the extraordinary need for discipline and obedience in their functioning, the necessity for impartiality and avoidance of even the appearance of divided loyalty or conflict of interest, justify treating them as a class apart. At least, the respondents might reasonably so decide.

The grievance procedures seem to contemplate appeal in certain instances beyond the respondent Commissioner of Labor to the Mayor [R. 61-62 (fols. 183-4)]. Exclusion of police from a procedure which may allow appeal beyond the Police Commissioner to the Commissioner of Labor or one of his deputies and then to the Mayor cannot, in view of the considerations we have recited, be deemed unreasonable, arbitrary, or a violation of equal protection guarantees.

It is artificial and unrealistic to contend that those matters which distinguish the police from other employees apply to self-organization (unionization) and collective bargaining arrangements but not to grievances. The Order presents a unified labor relations program, in which grievance machinery is a step in collective bargaining. For example, under departmental rule (see *Butler* v. *Monaghan*, *supra*), the police may not join labor unions, and since the grievance machinery contemplates that such organizations may and probably will represent an employee in the presentation of a grievance (R. 20, 59-61), it is not arbitrary to refrain from applying that machinery to them.

The petitioners have employed inverted reasoning in stating that respondents' objective in excluding policemen from the grievance procedure aspects of the Executive Order is the prevention of unionization, which in turn is

based on the need to maintain strict discipline (Pet. Br., p. 11). Rather, the need to maintain discipline, in the respondents' judgment and in the view taken by the Appellate Division [R. 125-6 (fols. 375-6)], is justification for excluding the police from union organization, from collective bargaining, and from grievance procedures which would involve disputing the orders and rulings of superiors. Each of these "rights" may fairly be considered inimical to the maintenance of discipline, and they are inseparably intertwined.

In essence, equal protection requires that all persons similarly situated be treated alike. The police are not situated similarly to other employees, but the Executive Order does affect all policemen in the same manner.

In any event, a tentative exclusion, subject to future change, from a program of an experimental character [R. 49-50 (fols. 147-9), 65 (fol. 194), 67] cannot be deemed the withholding of a right of such a nature as to merit constitutional protection.

(4)

The New York courts make appropriate distinctions between groups of public employees when it is reasonable to do so. A rule forbidding outside employment which is invalid as to a Department of Welfare investigator may be valid as to a fireman. *Matter of Natilson* v. *Hodson*, 264 App. Div. 384 (1st Dept., 1942), aff'd 289 N. Y. 842 (1943); *cf. Matter of Calfapietra* v. *Walsh*, 183 Misc. 6 (Sup. Ct., N. Y. Co., 1944), aff'd 269 App. Div. 734 (1st Dept., 1945), aff'd 294 N. Y. 867 (1945).

We agree that with respect to other kinds of employees policemen and firemen may stand apart for disciplinary

purposes, which is all that is stated in the two cases cited by petitioners. It does not follow, however, that as between themselves they must be treated as a single class, or that no valid distinctions may be drawn between them. Requirements of strict discipline may be even more compelling for policemen than for firemen. At least, responsible authorities are not arbitrary in believing so. The nature of their respective duties supports that view.

Under the New York City Charter, § 435, the police force is required to:

> "preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; protect the rights of persons and property, guard the public health, preserve order at elections and all public meetings and assemblages; subject to the provisions of law and the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; arrest all street mendicants and beggars; provid proper police attendance at fires; inspect and observe all places of public amusement, all places of business having excise or other licenses to carry on any business; enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses."

In addition, a vast miscellany of regulation is committed to police jurisdiction, ranging from such matters as the possession of firearms to prohibitions against unnecessary noise. See N. Y. C. Adm. Code, Art. 18, Title A.

The City Charter, §§ 487-490, confers upon the Fire Department exclusive jurisdiction to extinguish fires within the City or upon any vessel in the port of New York. The Fire Commissioner has jurisdiction over the location of fire alarm telegraphs and signals, the storage of combustibles, the investigation of causes of fires, the suppression of arson, the inspection of premises for fire hazards, and related powers.

It is discernible that policemen act primarily in relation to persons, whereas firemen act primarily upon property or things. The impact of this difference is not substantially weakened by the circumstance that firemen are given limited powers to make arrests and serve process in criminal actions in "cases arising under laws relating to fires and the extinguishment thereof, and to fire perils" (N. Y. C. Adm. Code, § 487a-15.0), for example, in connection with obstructing fire apparatus (§ 487b-2.0) or false alarms (§ 487e-1.1). Whatever the disciplinary strictness incumbent upon the wielder of a fire hose, we submit that there is reason to subject the possessor of a revolver and a night stick to discipline even more stringent.

Even if the essential distinction between police and firemen is only a matter of degree, that is sufficient under such expressions as those which follow concerning alleged offenses against the right to equal protection of the laws.

The full scheme of the legislature cannot be condemned because the courts may not approve of certain details.

Chamberlin, Inc. v. *Andrews*, 271 N. Y. 1 (1936), aff'd 299 U. S. 515 (1936). The Constitution does not require things which are different "in fact or opinion" to be treated in law as though they were the same. *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Tigner* v. *Texas*, 310 U. S. 141 (1940). Narrow distinctions, if reasonably related to the object of the legislation, will justify legislative classifications. *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938). A classification having some reasonable basis does not offend because not made with mathematical nicety or because it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911). The prohibition of the equal protection clause goes no further than the invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

In considering application of the foregoing principles in cases involving public employees particularly, we find, for example, that there is no offense against the equal protection clause in discharging policemen for union membership. *Goodwin* v. *Oklahoma City*, 199 Okl. 26, 182 P. 2d 762 (1947), and cases *supra* page 5. Veterans may be given civil service preference. *Matter of Bateman* v. *Marsh*, 296 N. Y. 849 (1947); *Matter of Potts* v. *Kaplan*, 264 N. Y. 110 (1934). The salaries of teachers may be reduced by a percentage method which results in some inequities. *Phelps* v. *Board of Education*, 300 U. S. 319 (1937). The extension of a retirement system to elective officers of a certain county only is not class legislation. *Goodale* v. *County Com'rs.*, 276 Mass. 114, 178 N. E. 228 (1931). A selection from among three of the highest ranking persons on an eligible list is constitutional. *Ricks* v. *Dept. of State Civil Service*, 200 La. 341, 8 So. 2d 49 (1942).

There is no basis for imputing unconstitutionality to the Executive Order as interpreted by the respondents and the State courts.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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